Filed 5/10/10 P. v. Villela CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SILVANO PADRON VILLELA, JR., Defendant and Appellant.	E047701 (Super.Ct.No. RIF120014) OPINION

APPEAL from the Superior Court of Riverside County. Gloria Trask, Judge. Affirmed with directions.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Elizabeth A. Hartwig, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Silvano Villela, Jr., of attempted willful, premeditated and deliberate murder (Pen. Code, §§ 664/187, subd. (a))[1] and assault with a deadly weapon (§ 245, subd. (a)(1)) and found that during both crimes defendant had inflicted serious bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)). He was sentenced to prison for life, plus four years and appeals, claiming there was insufficient evidence of premeditation and deliberation and the jury was misinstructed. We reject his contentions and affirm, while directing the trial court to correct an error in the abstract of judgment.[2]

FACTS

The victim testified that she and defendant began dating in February 2003 and became engaged in September 2003. Shortly after, the victim discovered that defendant had lied to her about his age[3] and although the relationship continued, the victim did not feel the same way about defendant. In August 2004, defendant began to complain of terrible headaches. He was always in terrible pain, missed work and had changed completely from the kind, loving and happy man he had been. The victim did not like being with someone who was in pain all the time. Defendant broke off the relationship on September 12, 2004 because the victim no longer trusted him, having caught him in

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Although we found the error ourselves upon reviewing the record, we commend appellate counsel for defendant for bringing it to our attention.

[3] He was 32 and she was 19 when they met. She testified that he had told her that he was 24 or 25.

other lies.[4] The following day, defendant changed his mind and wanted to reconcile, but the victim said she'd have to see. They continued to see each other and be intimate, but she told him she just wanted to be friends. He, on the other hand, wanted a romantic relationship. At some point after the breakup, defendant had told the victim that he did not want to live anymore, he had threatened suicide and he was in psychological treatment. Before October 26, 2004, sometimes defendant would not respond to the victim, as though he did not hear her, and he would not remember things they had done together.

On October 25, 2005, defendant called the victim and said that he felt terrible. The victim invited him to come to her apartment. They met in the parking lot of the apartment complex a little after midnight on October 26. Defendant was blank-faced, unresponsive and seemed disconnected, like a zombie. Once inside her apartment, the victim showed defendant her Halloween costume and a new piercing. She was surprised when defendant asked her for the sweaters he had previously left at her apartment because he had always been so generous to her in the past. She went into her bedroom to get them. Defendant followed her to the door of her bedroom and stared at her roommate, who was sitting on her bed, reading. The victim retrieved the sweaters and returned to the living room where defendant followed her. She told defendant that she had a lot going on and was tired and wanted to sleep. Defendant asked the victim if he

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[4] Defendant admitted that he failed to disclose to the victim that he had been married before. The victim testified that defendant also lied to her about where he had been born. Defendant said that the September 12, 2004 breakup was precipitated by what the victim interpreted was a lie he told her about the mirror on his truck.

could stay and she was indifferent. She lay down on the floor of the living room (there was no furniture for sitting or lying) and defendant lay behind her. Defendant began to touch and kiss her, as though requesting sex and, despite the fact that they did not argue, she told him that "this c[ouldn't] go on anymore" that she would only make love with her husband and defendant would not be her husband.[5] She had never before said anything like this to defendant. She fell asleep.

She awoke to defendant kneeling over her, holding one hand over her mouth, which made it difficult for her to breathe, and a knife in the other. She asked defendant what he was doing and she told him she could not breathe and he was hurting her. Defendant angrily and aggressively began stabbing her in the neck with the knife. He stabbed her at least 12 times and did not seem to react to her screams. She tried to get

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[5] In his reply brief, defendant mischaracterizes the evidence of physical contact between him and the victim as follows, "They kissed and touched. (1RT 84, 86-87, 118) . . . [A]ll contact was consensual." There is nothing at RT 84 or RT 86 concerning this. At RT 87, the victim testified that before she fell asleep, "he did try to initiate some type of activity, which I refrained from. And I had told him that we were no longer together, and I was determined to completely delete any type of intimacy with" defendant. The victim was asked specifically what *defendant* did. She responded, "Broadly, touching, kissing." She was then asked, "But he did something that in your mind was going to lead to intimate contact?" She responded affirmatively. She was then asked, "And you told him that you didn't want to do that[?]" to which she responded, "Yes." On page 118, when asked by defense counsel if "the two of you" hugged and kissed, the victim responded, "I don't recall." When asked if there was an affectionate exchange between them, she answered, "I don't recall. Possibly." She was then asked whether defendant never asked her to make love with him that night. She responded, "There was touching involved." When asked if there had been any argument between them, she said, "I had just made a clear statement . . . that I didn't want him . . . insinuating anything." Since defendant did not recall any of this, we have only the victim's testimony to go on, and it is clear that she did not participate in whatever kissing and touching defendant performed on her.

away and he stabbed her in the head and ear. She testified at trial that defendant "was going at my head." She yelled out his name and told him that he was hurting her. She tried to cover her head and crawl towards her bedroom. She then heard a voice say, "Help me, help me" and she saw one of her apartment mates standing nearby, frozen, while the other ran out to get a neighbor. Suddenly, the victim's roommate came out of their bedroom and cursed at defendant and pulled him off the victim. Defendant ran out of the apartment, barefooted. The victim had a large cut to her neck that required stitches, a cut on her ear that required stitches, two cuts on the front of her wrists and a cut between her fingers. There were injuries on both the left and right sides of her head and neck, which were shown to the jury.

The victim's roommate testified that before she went to sleep, she heard defendant and the victim yelling and arguing in the living room and the roommate turned up her radio to drown out the sound and went to sleep. She awoke later to the victim's screams. She opened the door to her bedroom and saw her apartment mate standing, as though in shock, near the couple. The victim was on the floor and defendant had his back to the roommate and was over the victim, who continued to scream. The roommate went down the hall and into the living room, getting behind defendant where she could see that defendant was stabbing the victim. He stabbed her many times—"one right after the other." The roommate asked defendant what he was doing and when she yelled at him, he began stabbing the victim faster. The roommate grabbed defendant under his shoulders. Defendant turned and grabbed the roommate by her upper arms and stared at her. He then took off, running out of the apartment.

A police lieutenant in a marked car spotted defendant, who was bloody and barefooted, in a construction area near the victim's apartment shortly after the attack. As soon as the lights of the lieutenant's car shone on defendant, he put his hands up and walked towards the car. Defendant said either that he was giving up or that he wanted to turn himself in. He said he had stabbed himself in the throat and hit his head with a rock. The lieutenant asked defendant why he was being arrested and defendant replied, "Murder." Defendant had a very flat affect.

The officer who booked defendant into county jail likewise testified that defendant was emotionless and added that he was cooperative. The officer said that defendant appropriately answered questions the former asked him in order to fill out the booking sheet. Defendant denied having lost consciousness.

Defendant testified, saying he could remember going to the victim's apartment, and seeing her Halloween costume and recent piercing, but could not remember asking her for his sweaters or seeing her roommate in their bedroom. He could not recall going to sleep—just waking up to someone screaming. He had no recollection of getting the knife or stabbing the victim and only remembered getting scared and running out of the apartment. As he ran, he saw the knife in his hand and blood on both his hands. He, therefore, thought he might have hurt the victim, so he stabbed himself in the neck and picked up a rock and hit himself in the head because he did not want to hurt her. He did not remember interacting with the lieutenant, but he did remember being at the hospital before being booked into jail. Despite his claim of failed memory, he said that the victim lied when she testified that she had told him that night that she did not want to be

sexually involved with him anymore and that he tried to touch her sexually. He testified that he did not recall any sexual activity between them that night.

ISSUES AND DISCUSSION

1. *Insufficient Evidence of Deliberation and Premeditation*

In claiming there was insufficient evidence of premeditation, defendant calls our attention to the types of evidence *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 addressed in determining whether there was sufficient evidence of premeditation and deliberation in that case. First is evidence of what defendant did prior to the stabbing "which show that the defendant was engaged in activity directed towards, and explicable as intended to result in, the" stabbing. (*Anderson* at p. 26.) Second are facts about the "defendant's prior relationship [with] and/or conduct with the victim from which the jury could reasonably infer a 'motive'" for the stabbing, which, together with facts in the first and third categories would support an inference that the stabbing was the result of pre-existing reflection and careful thought and weighing of considerations, rather than an unconsidered and rash impulse hastily executed. (*Anderson* at p. 27.) Third, are facts about the nature of the stabbing from which the jury could infer that its manner was so particular and exacting that defendant must have intentionally stabbed according to a preconceived design and for a reason the jury may infer from facts in the first and second categories. (*Ibid.*) As defendant points out, however, the list of factors is not exhaustive. (*People v. Pride* (1992) 3 Cal.4th 195, 247.)

Applying the above, defendant contends there was no evidence of planning. He is incorrect. He waited until the victim's apartment mates and her roommate were in their

bedrooms before he attacked her. Although it is not clear from the evidence whether all three women were asleep, certainly the victim's roommate was. Defendant waited until the victim was asleep to attack her. He put his hand over her mouth to muffle her screams so her apartment mates and her roommate would not hear her and come to her rescue. He obtained the knife—whether he brought it with him or got it from the kitchen (the evidence did not establish)[6] but it is common sense that he had to do one or the other, as there was no evidence it was in the living room when he and the victim lay down there. This is planning evidence.

Defendant asserts there was no evidence of motive. There was. Defendant was insisting on continuing his romantic relationship with the victim while she wanted only to be friends. Additionally, the last thing she did before the stabbing was, for the first time in their relationship, tell him that she was not interested in continuing to have sexual

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[6] He testified that he never carried a knife on his person, so he had to have made the decision to get it and bring it to the living room. He testified that he did not remember where he got it. Defendant cites to the prosecutor's argument to the jury (not always a good place to look for evidence when arguing its insufficiency) that he got the knife from inside the apartment. Defendant misconstrues the prosecutor's argument. The prosecutor said, "[The victim] goes to sleep, and then [defendant] goes and gets a weapon. . . . He goes and gets a weapon, comes back, stabs multiple times. . . . [¶] . . . [¶] . . . We have defendant getting a weapon after the victim has already fallen asleep . . . . [He w]aits for the victim to fall asleep, gets a knife, . . . stabs [her] repeatedly in the neck, in the throat area, stabs her in the head." The prosecutor did not say that defendant got the knife from inside the apartment. As we have stated, there was no evidence where defendant got the knife. Defendant's truck was parked outside the apartment. He could have gotten the knife from there.

contact with him,[7] as she was saving herself for her husband, who would not be defendant. That was motive, even if, as the victim testified, there had been no argument between the two before she went to sleep.[8]

Finally, defendant contends that the manner of his attack on the victim suggested that it was not premeditated. Again, we disagree. Defendant stabbed the victim repeatedly in the neck and head—as her roommate described, "one [stab] right after the other." According to her roommate, when the roommate got close to defendant and began yelling at him, he stabbed the victim even faster. The jury saw the victim's wounds and found, as to both crimes, that defendant had inflicted serious bodily injury. It would have been reasonable for the jury to infer that defendant did not begin his attack on the victim with a knife that did not have a handle. Yet, by the time he was stopped by the lieutenant, the knife was missing its handle. From this, the jury could infer the viciousness of his attack on the victim, which she described "as if I had killed his son. . . . It was more like two gangsters on the floor with . . . aggressiveness, force" suggested premeditation and deliberation. Defendant, himself, believed that he had so effectively attacked the victim that she was dead, hence his statement to the lieutenant that he was being arrested for murder. And defendant went for the most vulnerable part

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[7] Defendant, himself, confirmed that never once in their relationship had the victim indicated that she did not want to have sex with him.

[8] As stated before, the roommate testified otherwise (see text at p. 5) and it is understandable, given the trauma of the events and her injuries, that the victim suffered a certain degree of amnesia about the events of that night.

of the victim's body—the head and neck, in what the victim described as his efforts in "[t]rying to reach his mission."

2. *Jury Instructions*

a. On Unconsciousness

Defendant requested that the instruction on unconsciousness be given which provides, in pertinent part, "The defendant is not guilty of [attempted murder and assault with a deadly weapon] if he acted while legally unconscious. Someone is legally unconscious when he . . . is not conscious of his . . . actions. Someone may be unconscious even though able to move. [¶] Unconsciousness may be caused by a blackout, or involuntary intoxication."

The trial court refused to give this instruction, finding there was no evidence to support it. Defendant here contends there was such evidence, although he concedes that his statements that he did not remember the event, unsupported by other evidence, is insufficient. (*People v. Coston* (1947) 82 Cal.App.2d 23, 40 (*Coston*)[9] [cited with

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[9] Specifically, defendant states, "'[A] defendant's mere statement of forgetfulness, unsupported by any other evidence, is at most very little evidence of unconsciousness . . . . There must be something more than [the defendant's] mere statement that he does not remember what happened to justify a finding that he was unconscious at the time of that act.' [Citation.]" However, on the next page of the opening brief, defendant states, "A defendant's stated inability to remember or fully recall committing the crimes with which he . . . is charged is sufficient to warrant an instruction on unconsciousness. (*People v. Wilson* (1967) 66 Cal.2d 749, 762; *People v. Bridgehouse* (1956) 47 Cal. 2d 406, 414, overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 92] . . . ." We not only see a complete conflict between these two statements, but *Wilson* and *Bridgehouse* do not support the proposition for which defendant cites them.

[footnote continued on next page]

approval in *People v. Rogers* (2006) 39 Cal.4th 826, 888. Indeed, in *Rogers*, the California Supreme Court held, "[D]efendant's own testimony that he could not remember portions of the events, standing alone, was insufficient to warrant an unconsciousness instruction. [Citations.] [¶] . . . Defendant's professed inability to recall the event, without more, was insufficient to warrant an unconsciousness instruction. [Citations.]" (*Rogers* at p. 888.)

Defendant finds additional evidence *Coston* called for in the fact that "the prosecution never disputed [that he] had suffered a brain injury and had been ill." However, neither of these things renders one unconscious. Many people with brain injuries and who are ill act consciously. The clinical psychologist, whose preliminary diagnosis in January and May 2005, was that defendant *potentially* had suffered organic brain damage[10] never testified that this damage could or did, in fact, cause him to act unconsciously. A clinical psychologist with education and training in neuropsychology opined that in November 2007, defendant suffered from organic brain damage, but, like the other psychologist, she said nothing about whether this might have rendered him

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[footnote continued from previous page]

Apparently realizing that *Coston* does not support his position, despite the fact that he cited it in his opening brief, in his reply brief, defendant asserts that it is inapplicable.

[10] She said she could not give a definite diagnosis because that was out of her field of expertise. Additionally, she conceded that a CAT scan performed in August, 2004 showed no brain abnormalities and what defendant did to himself after these crimes (hitting himself in the head with a rock) could have produced some of the phenomenon she observed.

unconscious on the night of the crimes. While she said that a person with organic brain damage can suffer blackouts, she did not testify that defendant did.

Defendant's own testimony, contrary to his assertion, did not constitute sufficient evidence of unconsciousness based on the concession defendant, himself, makes.[11] Moreover, his lack of memory seems very convenient—he can recall only benign acts at the time of the crimes, but none that point to his guilt. Moreover, the fact that he believed he killed the victim and acted accordingly (by stabbing himself and hitting himself in the head with a rock) contradicts any claim that he acted unconsciously.

Defendant's reliance on *People v. Newton* (1970) 8 Cal.App.3d 359 and *People v. Moore* (1970) 5 Cal.App.3d 486 are misplaced. In *Newton*, the defendant had been shot in the abdomen before firing shots and his wounds could have caused shock. In *Moore*, an expert testified that defendant was in a schizophrenic fugue state. Neither occurred here.

b. Intoxication

For purposes of this discussion only, we will assume that the ingestion of prescription drugs, in the manner prescribed, which causes intoxication for which the patient has not been warned, constitutes involuntary intoxication. At the time of trial, the instruction on involuntary intoxication directed the jury to consider evidence of it in deciding whether defendant had the required intent or mental state when he acted. (Judicial Council of California Criminal Jury Instructions, CALCRIM No. 3427.)

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11 See footnote 9, *ante*, page 10.

Defendant requested that this instruction be given, based on the antidepressant he had been prescribed.[12] A pharmacist testified for the defense that the most common side effects of this drug was drowsiness (25 percent of patients), dizziness (15 percent), headache (10 percent) but, inter alia, confusion, agitation, nervousness, loss of memory, irritability, tremors, seizures, paresthesias,[13] and syncope[14] could also occur. He said that suicidal patients on this drug would have to be closely monitored and it was contraindicated for a person with a history of head injury. However, he admitted that he did not know what side-effects, if any, defendant would experience on this drug.

Defendant testified that he had been given a 30 day prescription for the drug in August 2004 and he took it twice a day, and did not get a refill.[15] When asked whether he ran out of the drug by September 2004, he said he did not remember. Defendant's attack here on the trial court's reliance on this as a reason for refusing to give the

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[12] This drug was Trazadone, and the testimony of the pharmacist called by the defense addressed only it. In his reply brief, defendant notes that one of the defense psychologists testified that defendant's medical records show that he was put on Paxil after complaining that Trazadone caused acne. Defendant then goes on to cite the Physicians' Desk Reference to show that the side effects for Paxil are the same as for Trazadone. However, this evidence was not before the jury, therefore it cannot be considered here. Moreover, the psychologist did not testify *when*, according to defendant's medical records, he began taking Paxil.

[13] He did not say what this was.

[14] See footnote 13, *ante*, page 13.

[15] Thus, defendant contradicted his own previous testimony that he had taken the drug up to October 25, 2004. The defense psychologist testified that according to defendant's medical records, he was placed on the drug, but she did not state when this occurred.

instruction is meritless. By doing so, defendant suggests that the trial court erred *by believing him*.

Finally, the victim's description of defendant at the time of the crimes, i.e., not acting like himself and zombie-like, was not inconsistent with his behavior in the months leading up to the crimes. Certainly, it did not establish that he was involuntarily intoxicated at the time of the crimes.

Therefore, there was no evidence defendant was on the drug at the time of the crimes and, even, if so, that it should be considered by the jury in determining whether he had the necessary intent or mental states for both crimes.

DISPOSITION

The trial court is directed to amend the abstract of judgment to show that a term of life was imposed for the attempted murder (count 1), not 7 years to life as the abstract currently states. In all other respects, the judgment is affirmed.

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RAMIREZ
P.J.

We concur:

RICHLI
J.

KING
J.